Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 32 and 64 of) CC Docket No. 93-251
the Commission's Rules to Account)
for Transactions Between Carriers)
and Their Nonregulated Affiliates)

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

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December 10, 1993

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SUMMARY

The additional regulatory requirements for affiliate transactions proposed by the Commission are burdensome, unnecessary and have not been shown to serve the public interest. USTA urges the Commission not to adopt the proposed rules.

Current rules and mechanisms already in place exceed the Commission's objective to prevent improper cross subsidy. The Commission has already determined that ratepayers should receive protection from improper cross subsidy as well as the additional benefits derived from economies of scope and scale. Thus, the Commission adopted a fully distributed costing methodology. In the Computer III Remand Order, the Commission responded to the Ninth Circuit Court of Appeals by further strengthening the cost accounting safeguards and stating that incentives to improperly cross subsidize.

The proposed rules are contrary to Commission initiatives in other proceedings, particularly in establishing incentive regulation for exchange carriers, as well. USTA provides an estimate of the cost of complying with the Commission's proposal to determine fair market value for affiliate transactions. Contrary to the incentive of price regulation to reduce costs, the cost would substantial. There is no evidence that the cost would be balanced by sufficient public interest benefits. The proposed rules do not reflect the competitive marketplace.

The proposed rules are unnecessary. There is no evidence that the current rules have failed to protect ratepayers.

USTA provides comment on some of the proposed changes,

urging the Commission not to restrict or eliminate prevailing company price as a valuation method, not to adopt the arbitrary "bright line" test, and not to require exchange carriers to utilize estimated fair market value

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OFFICE OF THE SECRETARY

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In the Matter of

Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions Between Carriers and Their Nonregulated Affiliates

CC Docket No. 93-251

COMMENTS
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UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits its comments in the above-referenced proceeding. USTA is the principal trade association of the exchange carrier industry. Its members provide over 98 percent of the exchange carrier-provided access lines in the U. S. USTA's member companies are subject to the regulatory mechanisms currently in place to protect against improper cross subsidy, including federal accounting requirements for transactions between carriers and their nonregulated activities.

In its Notice of Proposed Rulemaking (Notice) released October 20, 1993, the Commission is proposing to adopt additional regulatory requirements for affiliate transactions. As will be explained below, these proposals are burdensome, unnecessary and have not been shown to serve the public interest. USTA urges the Commission not to adopt the proposed rules.

I. THE PROPOSED RULES IMPOSE UNNECESSARY REQUIREMENTS, ARE INCONSISTENT WITH OTHER COMMISSION INITIATIVES TO ENCOURAGE CARRIER EFFICIENCY AND FAIL TO RECOGNIZE THE COMPETITIVE ENVIRONMENT.

A. Current Rules Exceed the Commission's Objective to Prevent Improper Cross Subsidy.

The current affiliate transaction rules were adopted by the Commission in 1987 in the Joint Cost Order.[1] There the Commission determined that specific affiliate transaction rules were required to compensate for any faulty incentives present under traditional rate of return regulation which may permit improper cross subsidization. "The proper purpose of our cost allocation rules is to make sure that all of the costs of nonregulated activities are removed from the rate base and allowable expenses for interstate regulated services. It is not our purpose, nor should it be our purpose, to seek to attribute costs to particular nonregulated activities for purposes of establishing relationship between cost and price."[2] There is nothing in the Notice which substantiates the Commission's apparent assumption that the current rules are somehow inadequate.

While the Commission acknowledged that use of long run incremental cost methodology could be sufficient to prevent

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[1]Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) [Joint Cost Order], recon., 2 FCC Rcd 6283 (1987) [Joint Cost Reconsideration Order], further recon., 3 FCC Rcd 6701 (1988), aff'd. sub non., Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir 1990).

[2]Joint Cost Order at ¶ 40.

improper cross subsidy, it adopted a fully distributed costing methodology to enable ratepayers to benefit from economies of scale and scope and to better approximate the results of unregulated markets. "...[O]ur purposes should transcend prevention of cross-subsidy. Our goal of just and reasonable treatment of ratepayers requires that ratepayers participate in the economies of scale and scope which we believe can be achieved through integration of nonregulated enhanced services within the basic service network. It would not be just and reasonable to allow all of those economies to belong to the nonregulated activities."[3] As a result of the Commission's actions in that proceeding, the current rules regulating affiliate transactions already provide ratepayers with protection from improper cross subsidy as well as additional benefits derived from carrier economies of scale and scope.

In the Computer III Remand Order, the Commission responded to a decision by the Ninth Circuit Court of Appeals that the Commission had not presented sufficient justification for reliance on cost accounting safeguards.[4] The Commission adopted a strengthened set of nonstructural safeguards that effectively protect against improper cross subsidization, while furthering the Commission's goals of a technologically innovative and

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[3]<u>Id</u>. at ¶ 109.

[4]<u>California v. FCC</u>, 905 F 2d 1217 (9th Cir. 1990).

economically efficient telecommunications infrastructure.[5] The Commission described the comprehensive system of cost accounting safeguards as consisting of five principal parts: the establishment of effective accounting rules and cost allocation standards; the requirement for telecommunications carriers to file cost allocation manuals (CAMs) reflecting the established rules and standards; the requirement for audit by independent auditors of carrier allocations, requiring a positive opinion on whether carriers' allocations comply with their cost allocation manuals; the establishment of detailed reporting requirements and the development of an automated system to store and analyze the data; and the performance of on-site audits by Commission staff.

The Commission reaffirmed its decision to employ a fully distributed cost allocation methodology to assure that ratepayers receive additional protection and benefit from the efficiencies gained through joint use of the network.[6] "The Commission has adopted affiliate transactions rules that prevent the BOCs from charging ratepayers inflated prices for goods and services obtained from nonregulated affiliates, or from providing these affiliates with goods and services at unduly low prices...By structuring our affiliate transaction rules this way, the nonregulated activity bears not just its incremental costs for asset and service transfers but general overhead costs as well,

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[5]Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991).

[6]Id. at ¶ 48.

which would otherwise be solely borne by regulated ratepayers."[7] There is nothing in the Notice to contradict these findings or to justify a requirement that fully distributed costing should not be utilized.[8]

In fact, in the Joint Cost Reconsideration Order the Commission noted that "[s]everal parties have argued that if a tariff or prevailing price is unavailable as a measure of value, we should look to the value of similar services in the marketplace. We believe that such a valuation standard is fraught with the potential for abuse, and would be difficult to monitor. In contrast, by requiring carriers and their affiliates to allocate costs pursuant to the cost allocation standards, we can ensure that an auditable measure of the cost of the service is available."[9] The Notice certainly does not contain any rationale as to why the Commission now believes that the proposed estimated fair market value would be easier to monitor.

In the Computer III Remand Order, the Commission also recognized that the implementation of incentive regulation reduces incentives to cross subsidize and is an effective

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[7]Id.

[8]Transactions with companies that were formed to consolidate support functions, rather than duplicate such functions in multiple affiliates, should be allowed to continue to utilize fully distributed costing. Many of these transactions have no comparable estimated fair market value. In addition, as noted above, the Commission already uses fully distributed costing for transactions within the exchange carrier that support both regulated and nonregulated activities

[9]Joint Cost Reconsideration Order at ¶ 131.

complement to cost accounting, reporting, auditing and enforcement safeguards. "[B]ecause price cap regulation severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic services rates, thus reducing the incentive...to shift nonregulated costs to regulated services."[10]

The five principal safeguards listed in the Computer III Remand Order are certainly not all that exist. In fact, a summary of current cross subsidy safeguards is quite extensive and includes:

- Cost accounting rules and allocation standards relying on generally accepted accounting principles (GAAP);
- Cost allocation manuals (CAMs), including emphasis on greater uniformity, requirements to quantify effects of manual changes and a low materiality threshold;
- Independent audit requirements with a positive opinion;
- Detailed financial and other reporting;
- Ongoing access tariff review process;
- The Commission's Automated Reporting and Management Information System (ARMIS)
- Commission on-site audits;
- Rules for jurisdictional and regulated allocation of costs;
- Rules for transactions with affiliates;
- A carrier's internal audits and cost tracking system control;
- State commission audit and review authority;

[10] Id. at ¶ 55.

- Inherent controls that would make it impossible to conceal any intentional act of cross subsidy; an impossible task;

- Competitor access to regulated activity data and accounts;

- Customer access to regulated activity data and accounts;

- Competitor and customer involvement in regulatory processes, including accounting, allocation standards, tariffing, complaint mechanisms and enforcement;

- Coordination between Federal and state agencies;

- Continuing interest and involvement of agencies other than communications regulators, such as the FTC, SEC, FASB and entities like the Department of Justice and state attorneys general;

- Increasing competition;

- Opportunities for resale often pitting interests of resellers against competitors in regulatory proceedings;

- Significant Commission experience with cross subsidy safeguards;

- Increased enforcement authority and high forfeiture amounts;

- Comprehensive implementation of price caps and other incentive regulation plans at the Federal and state level which erase opportunities to move costs and then recover them;

- The marketplace influence and sophistication of large customers and other carriers, such as AT&T and MCI, who know the process and participate in it aggressively to reduce their costs;

- For many exchange carriers, the effective market pressure of other exchange carriers, low cost carriers that do not want to provide unneeded public policy support, and who have an interest in removing excess costs of other carriers; and

- Federal and state statutes, including antitrust statutes.

All of these mechanisms exert inexorable discipline and provide effective protection against improper subsidization. Further rules, such as those proposed in the Notice, are not required.

B. The Proposed Rules are Contrary to Commission Initiatives.

The proposed rules will severely reduce economies of scale and scope and will increase the cost of providing service, both of which are contrary to the efficiency incentives sought by the Commission in its initiatives adopting price regulation. The Commission has recognized that price regulation eliminates incentives for regulated carriers to cross subsidize and creates incentives for carriers to reduce costs and increase revenues. "In the face of such [price] constraints, a carrier's primary means of increasing earnings are to enhance its efficiency and innovate in the provision of service Because cost padding and cross-subsidization do not justify higher prices under this system - but instead lower profits - the incentives to engage in such activity are limited."[11]

The Notice tentatively concludes that even with the adoption of price regulation, the present valuation methods for affiliate services reward imprudent carrier conduct.[12] The Notice claims

[11]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) at ¶ 36.

[12]Notice at ¶ 32.

that carriers are motivated to sell services to nonregulated affiliates at less than fair market value and to pay more than fair market value for services. Despite the fact that the Notice cites no examples where carriers have engaged in such behavior, the Notice proposes to adopt the asymmetrical asset transfer rules using estimated fair market value for services. Contrary to the Commission's conclusions, price regulation obviates the need for any affiliate transaction rules.

As noted above, price regulation focuses on the prices carriers charge their customers rather than on carrier earnings. Customers are protected by the caps placed on the prices which can be charged. Price regulation encourages carriers to reduce costs and to become more efficient in order to retain higher earnings. The Notice does not reflect the incentives of price regulation. For the Commission to assume that carriers can use valuation of affiliate transactions to manipulate earnings fails to recognize the dynamics of the competitive marketplace and the incentive to reduce expenses. Under price regulation, carriers which provide services to an affiliate below market value or purchase services from an affiliate at above market value will experience lower profitability with no corresponding benefit.

Some carriers have consolidated support functions to maximize economies of scope, rather than duplicate such functions in multiple affiliates. Requiring use of estimated fair market value may force the affiliate to obtain service elsewhere. While that may not necessarily be detrimental on its face, it will result in the loss of economies of scope since the carrier will incur greater costs to provide the service for its sole use, thereby defeating the efficiency incentives of price regulation.[13]

Because price regulation encourages carriers to reduce costs and increase efficiency in order to be successful, Commission actions which will increase administrative costs are inconsistent with the inherent incentives of that form of regulation. The costs of implementing the proposed rules will be significant and the Commission has demonstrated no ratepayer benefit.[14] For example, the application of the asset transfer rules to services will require that for each service provided between affiliates, the carrier must determine not only the fully distributed cost of the service, but also its estimated fair market value.

Based on preliminary market research, it would cost an average of $40,000 to obtain an estimated fair market value for a particular affiliate transaction. This would translate to a cost for Tier 1 carriers of approximately $91 million. This estimate does not include smaller exchange carriers, nor does it include the administrative costs necessary to implement this and other proposed rule changes. Finally, it assumes estimated fair market

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[13]<u>See</u> p. 17, <u>infra</u>.

[14]The proposed rules will continue to place a disproportionately high cost of compliance on smaller exchange carriers with, in many cases, minimal affiliate transactions. Given the continually increasing competitive challenges facing all exchange carriers, the Commission should seek opportunities to relieve carriers of unnecessary regulatory burdens.

value information is available for all services, which is not the case as will be discussed below.

It certainly would be imprudent to expend additional amounts without some evidence that the expenditure would be balanced by sufficient public interest benefits

USTA agrees with the Commission that implementation and compliance costs be treated as exogenous for carriers under price regulation.[15] Such costs meet the Commission's definition of exogenous. Carriers under rate of return regulation should be permitted to assign 100 percent of these costs to the interstate jurisdiction for recovery.

The Commission also suggests that AT&T may not be subject to the proposed affiliate transaction rules because its price cap plan does not include sharing. If the Commission is concerned that vestiges of traditional rate of return regulation remaining in exchange carrier price regulation plans allow cross subsidization, it should revise the plans to remove those aspects of traditional rate of return regulation which interfere with the realization of the incentives of price regulation, including sharing, instead of creating additional regulatory barriers as it has in the Notice.

Implicit in the Notice's tentative conclusions is an assumption that there will be a significant difference between cost and market value. Such an assumption is certainly contrary to Commission initiatives in other proceedings as well. The

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[15]Notice at ¶ 36.

Commission, recognizing the natural growth of competition, has actively fostered such growth in the access marketplace by allowing expanded interconnection with exchange carrier special and switched access facilities in CC Docket No. 91-141. In that docket, the Commission noted that the degree of regulation should be tailored to marketplace conditions, including allowing exchange carrier prices to reflect traffic-density-related cost differences among carrier-specific market areas.[16]

Likewise, in CC Docket No. 91-213, the Commission noted that one of its objectives was to encourage the efficient use of transport facilities by allowing pricing that reflects the way costs are incurred.[17] Certainly in these instances the Commission is acknowledging that in a competitive marketplace, prices will be driven to cost. As noted above, the Commission originally adopted the fully distributed cost standard to better reflect the marketplace. The Notice is inconsistent with Commission initiatives and should not be adopted.

C. The Proposed Rules Do Not Accurately Reflect the Current Competitive Marketplace.

The current telecommunications marketplace is characterized by rapidly emerging technologies and rapidly increasing

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[16]Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order, 7 FCC Rcd 7369 (1992) at ¶¶ 174-179.

[17]Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, released October 16, 1992 at ¶ 2.

competition. The traditional industry structure is changing as companies merge and form business partnerships and enter new lines of business. Even the public switched network itself is evolving into a "network of networks". Exchange carrier competitors are not subject to the onerous regulatory requirements imposed on exchange carriers and, thus, do not incur the added costs which these regulations generate. That gives competitors an unearned competitive advantage. The Notice seems to ignore current marketplace conditions, the Commission's aggressive pro-competitive policies and technological advances by advocating more regulation which is not even consistent with incentive-based regulation.

As the Commission stated in the Joint Cost Order, "[o]ur goal is to choose rules that cause regulated markets to produce results as close as possible to the results of unregulated markets that are subject to a high degree of competition."[18] Certainly the trend at the state level, as well, is to reduce burdensome regulatory requirements and to provide incentives for carriers to operate with even greater efficiency in the face of competition. Given the lack of any public interest benefit in requiring such rules, the Commission should not interfere with the operation of the competitive marketplace by further restricting one group of competitors.

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[18] Joint Cost Order at ¶ 111.

D. The Proposed Rules are Unnecessary.

As noted above, the current rules are more than adequate to prevent improper cross subsidy. The Notice contains no evidence that the current affiliate transaction rules have resulted in harm to ratepayers. To the contrary, the record shows that the current rules have assisted the Commission in identifying and investigating allegations of improper cost shifts. As the Commission itself pointed out in the Computer III Remand Order, the current cost allocation rules enabled the Commission to identify and take action which it believed was appropriate regarding alleged improper affiliate transactions between NYNEX telephone companies and its nonregulated affiliate.[19]

The Commission's response to the Ninth Circuit still holds, "[b]ased on our experience of nearly four years, and based on the record developed on remand, we conclude that our cost accounting safeguards constitute a realistic and reliable alternative to structural separation to protect against cross-subsidy. We find as well that the adoption and implementation of incentive regulation...serves as an effective complement to these cost accounting safeguards by reducing...incentives to cross-subsidize..."[20] Further, in a recent decision adopting

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[19]Computer III Remand Order at ¶ 54. See, also Contel Telephone Operating Companies Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, Notice of Apparent Liability for Forfeiture, FCC 91-91, 6 FCC Rcd 1880 (1991).

[20]Id. at ¶ 56.

regulatory reform plans for small and mid-sized exchange carriers, the Commission concluded that "attempts to cost shift would be detectable in two ways--through the biennial tariff review process, which requires a showing of cost by basket, and, for a few of the carriers likely to elect the plan, through ARMIS, and the Commission staff's performing trend analysis and comparing reports from several carriers to divulge anomalies."[21]

Given the extensive number of existing safeguards against improper cross subsidy, the comprehensive review of price cap regulation which is scheduled to begin shortly and during which the Commission will consider the elimination of the sharing mechanism, the Commission's other initiatives designed to better accommodate the competitive environment, the rapidly increasing competition faced by exchange carriers and the lack of record evidence that the costly changes proposed by the Commission are warranted, the Commission should reject the proposed rule changes. At the very least, the Commission should defer consideration of the proposed rules until after the comprehensive review of price cap regulation is completed.

II. THE SPECIFIC RULES PROPOSED IN THE NOTICE ARE UNNECESSARY AND UNDULY BURDENSOME.

As explained above, USTA believes that the Commission's proposal is unwarranted and should not be adopted. However, USTA

[21]Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, CC Docket No. 92-135, Report and Order, released June 11, 1993.

discusses specific proposals below.

A. The Commission Should Not Restrict or Eliminate Prevailing Company Price as a Valuation Method.

Under the current rules, non-tariffed products and services are valued at the prevailing company price whenever the affiliate also conducts substantial transactions with nonaffiliates. The rationale behind this requirement is that a nonaffiliate's willingness to buy a product or service in substantial quantities provides a reasonable assurance that the prevailing company price is reasonable. However, the Notice questions whether affiliate transactions are sufficiently similar to transactions among nonaffiliates to justify the continued use of prevailing company price as a valuation method for affiliate transactions and tentatively concludes that prevailing company pricing be discontinued as a valuation method.[22] USTA believes that the rationale supporting the use of prevailing company price continues to be valid and that this valuation method should be retained.

Transactions among nonaffiliates exhibit many of the same characteristics as transactions among affiliates. Certainly many nonaffiliates enjoy long-standing relationships. The existence of such a relationship does not mean that prevailing company prices do not reflect market prices. Transactions with nonaffiliates are at arm's length. Such an arm's length

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[22]Notice at ¶¶ 18-19.

transaction can best be emulated by charging an affiliate the same price that the nonaffiliate is willing to pay.

Eliminating prevailing company price as a valuation method would place exchange carriers and their affiliates at a competitive disadvantage by forcing exchange carrier affiliates to implement expensive accounting systems which competitors would not be required to implement. Such added costs could make the exchange carrier affiliate, that may otherwise be the most efficient supplier, noncompetitive. The exchange carrier could be forced to purchase products or services at higher prices from nonaffiliates instead of benefitting from economies of scale made available by spreading costs over a broader base of companies. In addition, affiliates whose primary business is to provide service to nonaffiliates may decide it would not be prudent to implement the costly accounting processes necessary to determine fully distributed cost for a single customer and refuse to conduct business with affiliates they cannot sell to at prevailing market rates. The Commission should not adopt rules which could result in arbitrary distortions in the marketplace. Such distortions will have a detrimental impact on exchange carriers and their customers by preventing exchange carriers from utilizing economic prices.

For example, the ratepayers of a group of exchange carriers within a holding company do benefit when the regulated carriers purchase products and services from their nonregulated affiliates because it minimizes their total cost and expense. This is accomplished because the nonregulated affiliate is able to supply telecommunications equipment and services at a lower cost than an individual exchange carrier could obtain in the marketplace.

The Notice also questions whether the Commission should distinguish among classes of affiliates in evaluating prevailing company price.[23] Such a classification would, at best, be arbitrary. The Commission would have to reclassify affiliates on a regular basis, as the primary purpose of an affiliate could change based on changes in technology, corporate structure or corporate philosophy.

B. The "Bright Line" Test Proposed by the Commission is Arbitrary and Unnecessary.

The Commission's proposal to establish a "bright line" test under which a nonregulated affiliate would be eligible for prevailing company pricing only if it sells at least 75 percent of its output to nonaffiliates, is a further unnecessary complication. There is no evidence provided that such an arbitrary measure is warranted. The current rules, as discussed above, are more than sufficient to prevent improper cross subsidy.

The Commission need not attempt to establish arbitrary, artificial constraints to ensure that a market price is utilized. Black's Law Dictionary defines fair market price as the amount at

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[23] Id. at ¶ 19.

which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.[24] The price charged the nonaffiliate is the fair market price. That price should also be utilized as the prevailing company price for purposes of valuating affiliate transactions as permitted in the current rules.

Further, the Commission should not attempt to define substantial as a fixed percentage of output. Substantial cannot be measured by a single test. What constitutes substantial will depend upon many considerations which are unique to a particular affiliate. Substantial in a particular circumstance may not be substantial in another circumstance or to another affiliate. USTA recommends that the Commission rely on already established safeguards, such as GAAP, Generally Accepted Auditing Standards and Commission review of audit workpapers, to measure substantial.

Should the Commission nonetheless adopt a "bright line" measure, USTA urges the Commission to establish the test on a historical basis to facilitate reporting. In addition, the Commission should confirm that the test does not apply to any nonregulated products or services sold by the exchange carrier. As the Commission has stated, "...requiring a carrier to list an affiliate transaction in the CAM does not make that transaction subject to §32.27. §32.27 affects only transactions that are

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[24]Black, H., Black's Law Dictionary (1979) at p. 537.

recorded in regulated accounts. When a carrier provides a nonregulated service to its affiliate and records the transaction in a nonregulated revenue account, §32.27 does not apply."[25]

Finally, USTA objects to the vague and open-ended nature of §§ 32.27(c)(2) and 32.37(d)(3) of the proposed rules. Rules of general applicability can only be adopted in a rulemaking proceeding. If the proposed wording is intended to include other Commission proceedings, the proposed rules violate the Administrative Procedures Act. USTA recommends that they be eliminated.

C. The Commission Should Not Require Exchange Carriers to Utilize Estimated Fair Market Value.

The Notice proposes to retain the present asset transfer rule that requires carriers to determine both the net book cost of an asset and its estimated fair market value.[26] It also proposes to extend this requirement to the provision of services.[27] USTA strongly opposes the extension of this requirement.

As noted earlier, the use of estimated fair market value for services has already been considered and rejected by the Commission. USTA's cost estimate also demonstrated that the

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[25]United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, AAD-90-22, Order, DA-92-899, released July 10, 1992 at ¶ 12.

[26]Notice at ¶ 25.

[27]Id. at ¶ 32.